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In The

Supreme Court of the United States

FLORENCE HARVEY; ULYSSES GAUTHREAUX; LIONEL ALBERT; ERNESTINE ALBERT; AND ALL OTHER SIMILARLY SITUATED PERSONS,

Petitioners,

v.

MOSAIC FERTILIZER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent takes issue with Petitioners' statement of the questions presented for review. The questions presented for review are:

1. Does the CAFA amendment to 28 U.S.C. § 1332, which is found in subsection (d)(2), irreconcilably conflict with 28 U.S.C. § 1332(a) such that it must be interpreted as providing the exclusive means for removal of state class actions, therefore precluding removal of class actions under traditional diversity, 28 U.S.C. § 1332(a)?

2. In determining whether the amount in controversy threshold required by 28 U.S.C. § 1332(a) for an individual class member's claim is met, is it appropriate for a district court to look to the state substantive law on damages recoverable by the class member?

LIST OF PARTIES TO THE PROCEEDING

Respondent also points out to the Court that following the removal of the underlying matter to federal court, the matter was consolidated with two other pending actions, *Vivian Folse, et al. v. Mosaic Fertilizer, LLC, et al.*, C.A. No. 06-9512, United States District Court, Eastern District of Louisiana and *Charlotte Anderson, et al. v. Mosaic Fertilizer, LLC*, C.A. No. 07-1465, United States District Court, Eastern District of Louisiana. The Plaintiffs in these two consolidated matters do not seek remand.

CORPORATE DISCLOSURE STATEMENT

Respondent, Mosaic Fertilizer LLC, provides the following Corporate Disclosure Statement pursuant to Supreme Court Rule 29.6:

> Mosaic Fertilizer LLC is owned by The Mosaic Company, Mosaic Global Operations Inc. and Phosphate Acquisition Partners L.P. The Mosaic Company is the only publicly traded company owning ten percent (10%) or more of Mosaic Fertilizer LLC.

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STATEMENT REGARDING CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Respondent takes issue with Petitioners' statement regarding the laws involved in this matter. The following laws are pertinent to this matter:

I. 28 U.S.C. § 1441(a):

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

II. 28 U.S.C. § 1332(a):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

III. 28 U.S.C. § 1332(d)(2):

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

IV. 28 U.S.C. § 1453:

(a) **Definitions.** – In this section, the terms "class", "class action", "class certification order", and "class

member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general. – A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders. –

(1) In general. – Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) Time period for judgment. – If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) Extension of time period. – The court of appeals may grant an extension of the 60-day period described in paragraph (2) if –

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) Denial of appeal. – If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception. – This section shall not apply to any class action that solely involves –

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 77p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

V. 28 U.S.C. § 1651:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

VI. Louisiana Code of Civil Procedure article 595(A):

A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

STATEMENT REGARDING ORDER AND REASONS OF DISTRICT COURT ATTACHED TO PETITIONERS' APPENDIX IS INACCURATE AND INCOMPLETE

The Order and Reasons attached as Exhibit A to Petitioners' Appendix is not accurate and is incomplete. The Order and Reasons attached to the Petitioners' Appendix contains some language that is not found in the actual Order and Reasons entered by the district court. In addition, the Order and Reasons submitted by Petitioners omitted the three footnotes which are found in the actual Order and Reasons of

the district court. One of those footnotes is critical to this Court's determination as it clearly provides that the district court did not make a determination as to whether the matter was properly removed under the alternative basis alleged – 28 U.S.C. § 1332(d)(2). Accordingly, in order to present the court with an accurate reflection of the underlying court's Order and Reasons, Respondent has included the district court's Order and Reasons in an Appendix attached to this brief.

STATEMENT OF THE CASE

On the evening of October 11, 2006, there was an equipment failure on a process heat exchanger in the Ammonia Production Unit at Respondent Mosaic Fertlizer LLC's (Mosaic's) St. James, Louisiana fertilizer facility. The following day two class action lawsuits were filed in the 23rd Judicial District Court, St. James Parish, State of Louisiana arising out of the incident. Both class actions were removed to the United States District Court for the Eastern District of Louisiana and were consolidated. In addition, a multi-plaintiff action was filed. That action was also removed to federal court. All three matters were consolidated. The instant action, the second class action filed, is the only one in which remand is sought.

The Petitioners herein, all residents of St. James Parish, Louisiana, allege that they and others similarly situated suffered both personal injury and

property damage arising out of a "large explosion" on October 11, 2006 from Mosaic's St. James facility. The Petitioners allege that the proposed class consists of "all persons who or which on October 12, 2006 [sic], were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear or fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant." Petitioners sought relief against Respondent for "judgment unto plaintiffs for damages, cost, interest, and attorneys fees as may be allowed by law under any theory of law as expressly pled herein or as may be applicable to the facts pled herein or as they may develop and be presented during the trial of this matter."

Respondent removed the case on the grounds that the district court had subject matter jurisdiction over the matter under both the traditional diversity jurisdiction statute, 28 U.S.C. § 1332(a), and under the additional grant of jurisdiction provided by CAFA in 28 U.S.C. § 1332(d). The Petitioners then filed a motion to remand the case to state court.

In its opinion, the district court addressed whether or not it had traditional diversity jurisdiction over the matter. Having found that complete diversity existed, the district court turned to the issue of whether or not "the amount in controversy for at least one plaintiff exceeds $75,000." The district court stated:

It is facially apparent from the petition that the claim of at least one named plaintiff is likely to exceed $75,000. Harvey alleges that she was at home in her trailer when the explosion occurred. The explosion rocked her trailer and caused her such fear and surprise that she required emergency medical treatment for "uncontrolled" blood pressure and pulse. One of the concrete piers supporting her trailer is askew. Gauthreaux became afraid when he heard the explosion, which caused a large window in his home to break and other damage. The Alberts were at home when the explosion occurred. They allege damage to their home, including a cracked driveway and cracked living room floor and personal fear and fright. When awardable attorney's fees are attributed to Harvey, Gauthreaux, and the Alberts in calculating the amount in controversy, any one of their claims likely exceeds the jurisdictional threshold. Moreover, the plaintiffs have not filed stipulations or affidavits of the parties or counsel that their claims fall below the jurisdictional amount.[1]

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[1] See Order and Reasons of district court (page 3) attached as Exhibit A to the Respondent's Appendix. It should be noted that the Appendix attached to Petitioners' brief does not include the actual Order and Reasons of the district court. The Order and Reasons attached to Petitioners' Appendix contains language that is not found in the actual Order and Reasons entered by the district court and omits the three footnotes found in the actual Order and Reasons. Accordingly, this Court should not rely upon the Order and Reasons attached to Petitioners' brief.

Under the authority of *Grant v. Chevron Phillips Chemical Co. L.P.*, 309 F.3d 864 (5th Cir. 2002), the district court properly considered awardable attorneys' fees to the class representatives under Louisiana class action law in its analysis. *Id.* at 870. After consideration of the claims of the named class representatives, including attributable attorneys' fees, the district court concluded that any one of the class representative's claims alone exceeded the jurisdictional threshold amount of $75,000.00. Accordingly, the district court concluded that it had original jurisdiction over this matter under 28 U.S.C. § 1332(a) and therefore the removal was proper under 28 U.S.C. § 1441(a). Based upon that finding, the district court properly denied Petitioners' motion to remand. The district court did not address the additional grant of jurisdiction under 28 U.S.C. § 1332(d)(2) (CAFA) since it was satisfied with jurisdiction under traditional diversity, 28 U.S.C. § 1332(a).[2]

Plaintiffs filed a writ of mandamus to the Fifth Circuit Court of Appeals raising the same issues that they have raised in their Petition for Certiorari to this Court. The Fifth Circuit denied the writ without opinion.

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[2] See Order and Reasons attached as Exhibit A to Respondent's Appendix, n. 1.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT THE WRIT OF CERTIORARI.

This case does not involve an important question of federal law that has not been, but should be, settled by this Court. Rather, the district court utilized traditional rules of statutory construction authorized by this Court to conclude that, based upon the clear and unambiguous terms found in 28 U.S.C. § 1332(a) and § 1332(d)(2), original jurisdiction exists over this matter. Therefore, there was no question that the removal was proper. Accordingly, in a situation such as this where the statutory basis upon which the class action was removed clearly supports the federal district court's exercise of jurisdiction over the removed matter, there is no serious question of federal law which needs to be settled by this Court.

In addition, the lower courts did not decide an important federal question in a way that conflicts with any relevant decision of this Court. To the contrary, in the course of evaluating whether removal of this matter to federal court was proper, the lower courts employed the procedure authorized by this Court for determining whether original subject matter jurisdiction existed. The lower court's position is not in conflict with this Court's decision in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002). Unlike the district court in *Syngenta,* which relied on the All Writs Act as the sole basis for asserting jurisdiction over the removed

action, the district court in this matter relied on the specific grant of original jurisdiction provided for in 28 U.S.C. § 1332(a) as the basis for asserting jurisdiction over the removed matter. Further, in the course of determining whether the named class representatives' claims exceeded the jurisdictional amount required by 28 U.S.C. § 1332(a), the district court employed the procedure authorized by this Court – it looked to state substantive law, including Louisiana Code of Civil Procedure article 595(A). Accordingly, the action by the district court is clearly not in conflict with *Syngenta* or any other decision of this Court. The Writ should therefore be denied.

A. 28 U.S.C. § 1332, as Amended by CAFA, Does not Limit Removal of State Putative Class Actions to Those that Meet the Parameters Set Forth in 28 U.S.C. § 1332(d)(2).

(1) Applicable Rules of Statutory Construction

"The text of a statute or rule is the primary, essential source of its meaning." Uniform Statute & Rule Construction Act (1995), § 10, 14 Uniform Laws Annotated (2005). In construing jurisdictional statutes, this Court has instructed that the statute's text should be examined in light of the context, structure, and related statutory provisions. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558, 125 S.Ct. 2611, 2620, 162 L.Ed.2d 502 (2005). As recognized by

this court, "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518, 2534, ___ L.Ed.2d ___ (2007), quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

Further, with regard to two statutory provisions that address the same situation, this Court has instructed that: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). Also, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *Id.*, citing *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939).

With regard to an amendment, this Court has instructed that when "Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole" and the courts "should give each as full a play

as possible." *Markham v. Cabell,* 326 U.S. 404, 411, 66 S.Ct. 193, 196, 90 L.Ed. 1969 (1945).

(2) Applying the Above Statutory Construction Rules, It is Clear That CAFA did not Supplant or Restrict the Traditional Diversity Jurisdiction Conferred Under 28 U.S.C. § 1332(a).

Applying the principles of statutory construction, it is clear that there is no support for Petitioner's position that 28 U.S.C. § 1332(d) provides the exclusive manner by which state court class actions may be removed to federal court after February 18, 2005. There is no ambiguity in 28 U.S.C. § 1332, as amended by CAFA. The provisions of 28 U.S.C. § 1332(a) and § 1332(d)(2) do not conflict with one another and can be read harmoniously to allow for removal of class actions under either or both subsections.

The context, structure and related statutes clearly indicate that the effect of CAFA, in particular the amendment to 28 U.S.C. § 1332 which added subsection (d), was to expand the original jurisdiction of federal courts to include class actions that fall within the parameters set forth in 28 U.S.C. § 1332(d)(2). The clear language of 28 U.S.C. § 1332, as amended by CAFA, does not indicate that Congress intended to prevent federal courts from exercising original jurisdiction over class actions that fall within the parameters of the traditional diversity jurisdiction

provision found in 28 U.S.C. § 1332(a). CAFA simply does not supplant or restrict the traditional diversity jurisdiction conferred under 28 U.S.C. § 1332(a). Rather, 28 U.S.C. § 1332, as amended by CAFA, provides parties seeking a federal forum "with an alternative to the traditional diversity-jurisdiction route." Fredman, *Plaintiff's Paradise Lost: Diversity of Citizenship and Amount in Controversy Under the Class Action Fairness Act of 2005*, 39 Loy. L.A. L. Rev. 1025 (2006). After the passage of CAFA, "the traditional path to diversity jurisdiction remains a viable option for some class actions." *Id.* at p. 1055.

(a) The Statutory Scheme Does not Support Petitioner's Position.

The general statute that governs removal of cases to federal district courts is found in 28 U.S.C. § 1441(a), which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed" to federal district court. Accordingly, if the federal district court has original jurisdiction over the matter that is to be removed, removal is authorized. Congress sets forth in 28 U.S.C. § 1332 the situations where the federal courts will be deemed to have original jurisdiction. One of these situations is the traditional diversity jurisdiction set forth in subsection (a) while the other is the recently added CAFA diversity jurisdiction set forth in subsection (d)(2).

There is absolutely nothing in the language of subsection (d)(2) in 28 U.S.C. § 1332 that indicates that its provisions preclude a class action from being removed based on the original jurisdiction provided for complete diversity in subsection (a). Reading 28 U.S.C. § 1441(a) together with 28 U.S.C. § 1332, it is clear that, in passing CAFA, Congress intended to, and in fact did, set forth an additional basis upon which a federal court is considered to have original jurisdiction and did not intend to narrow the scope of subsection (a). As this Court instructed in *Markham*, *supra* at 411, when Congress amends one section of a law and leaves another untouched, courts should consider that the two sections "were designed to function as parts of an integrated whole" and each section should be given "as full a play as possible." Giving subsection (a) and subsection (d)(2) "as full a play as possible," a class action which meets the criteria of subsection 28 U.S.C. § 1332(a) may be removed to federal court based upon the original jurisdiction provided for in that subsection, even after CAFA.

The fallacy in Petitioners' argument is revealed when one considers the scenario where a class action does not meet the criteria set forth in 28 U.S.C. § 1332(d)(2) (such as the $5,000,000.00 amount at controversy threshold) for original jurisdiction to exist over the class action, but the class action meets the criteria set forth in 28 U.S.C. § 1332(a) for original jurisdiction to exist over the class action. In that situation, 28 U.S.C. § 1332(d)(2) would clearly not be

applicable and there would be no possibility of a conflict between 28 U.S.C. § 1332(d)(2) and 28 U.S.C. § 1332(a). Obviously, if one of the allegedly conflicting provisions does not even apply to the factual situation presented, there is no conflict and therefore, the other provision clearly applies.[3]

Petitioners have not cited to any language in the CAFA amendments or in 28 U.S.C. § 1332 that supports their argument that the only means for removal of class actions after the effective date of CAFA, is under 28 U.S.C. § 1332(d)(2). Rather, Petitioners have simply argued that since there happens to be a new provision under 28 U.S.C. § 1332 that allows certain class actions to be removed, that provision is the only means by which a class action may be removed. This argument is unfounded.

[3] Indeed, in this particular case, Petitioners have argued that the amount in controversy in this matter does not meet the $5,000,000.00 threshold required by 28 U.S.C. § 1332(d)(2). For the purpose of argument, if Petitioners are correct with regard to that contention (which is denied), then 28 U.S.C. § 1332(d)(2) is not applicable and for purposes of the case presented to this Court, there is no conflict between 28 U.S.C. § 1332(d)(2) and 28 U.S.C. § 1332(a).

(b) 28 U.S.C. § 1453 Does Not Indicate That Class Actions Are Limited to Removal Under 28 U.S.C. § 1332(d)(2).

Contrary to Petitioner's contention, 28 U.S.C. § 1453 does not contain language that indicates that removal of a class action is limited to those class actions that fall within the parameters of 28 U.S.C. § 1332(d)(2). First, 28 U.S.C. § 1453 does not authorize any removals. Indeed, unlike 28 U.S.C. § 1332, 28 U.S.C. § 1453 does not confer original jurisdiction over any particular type of action. Rather, this statute simply sets forth procedural rules to be utilized in effectuating the removal of "class actions."

Petitioners incorrectly rely on the reference in 28 U.S.C. § 1453(a) to the definition of the terms "class" and "class action" found in 28 U.S.C. § 1332(d)(1) in support of their argument. Other than adopting the definitions for those terms that are found in 28 U.S.C. § 1332(d)(1), 28 U.S.C. § 1453 does not depend on 28 U.S.C. § 1332 in any other manner and certainly does not set forth a mandate regarding when a federal court will have jurisdiction over class actions. Accordingly, this statute does not support Petitioners' position.

(c) The Word "Shall" in 28 U.S.C. § 1332(d)(2) does not Indicate That Class Actions are Limited to Removal Under 28 U.S.C. § 1332(d)(2).

Petitioners also argue that Congress' use of the mandatory word "shall" in 28 U.S.C. § 1332(d)(2) indicates that the district court was limited to applying that section for removal of this action. Petitioners overlook the fact that the term "shall" is also found in 28 U.S.C. § 1332(a). Reading each of these subsections together, it is clear that Congress used the term "shall" in both subsections to indicate that there can be no question that a district court has original jurisdiction over any matter that falls within the parameters set forth in each of those subsections. The language of these subsections does not indicate that Congress intended to limit removal of class actions to those that fit within the parameters of 1332(d)(2).

(d) The Historical and Statutory Notes are Irrelevant.

Petitioners incorrectly refer the Court to portions of the Historical and Statutory Notes regarding the enactment of CAFA. As this Court recognized in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558, 125 S.Ct. 2611, 2620, 162 L.Ed.2d 502 (2005), if the language in the statute at issue is unambiguous, a court cannot rely on extraneous matters to "adopt an artificial construction that is narrower than what the text provides." 545 U.S. at

558. Petitioners have not established that the statutory provisions at issue are ambiguous. Therefore, Petitioners' reliance upon this extraneous matter is clearly inappropriate.

In the alternative, even if the extraneous matter cited by Petitioners could be considered (which is denied), there is nothing in the notes cited by Petitioners that supports their position that Congress intended for the CAFA amendment to 28 U.S.C. § 1332, which added subsection (d), to provide the exclusive manner for removing class actions filed on or after that date. Further, the legislative history of CAFA is replete with statements that CAFA was intended to expand federal jurisdiction, not contract it.[4]

(e) "The Specific Prevails over the General" Rule Relied on by Plaintiffs is not Applicable Where There is no Irreconcilable Conflict.

Petitioners have incorrectly applied the "fundamental rule of statutory interpretation" – that "the specific supersedes the general". Petitioners have omitted a critical element that must exist before that rule comes into play. This rule of statutory interpretation provides: "Where there is **inescapable conflict**

[4] See, e.g., S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 41, 2005 WL 627977.

between general and specific terms or provisions of a statute, the specific will prevail." 2A *Sutherland Statutory Construction* § 46:5 (7th Ed.). Accordingly, before the specific will be found to supersede the general, there must be a finding that a conflict exists between the two provisions at issue and that conflict must be one that is considered to be irreconcilable.

As noted above, there is no conflict between 28 U.S.C. § 1332(a) and 28 U.S.C. § 1332(d)(2), much less an irreconcilable one. Utilizing the rules of statutory interpretation adopted by this Court, the two subsections at issue can be read in harmony to allow for removal of class actions based on either the traditional diversity jurisdiction provision found in subsection (a) or based on the CAFA diversity jurisdiction provision found in subsection (d)(2).

Indeed, this Court recognized in *Allapattah* that CAFA did not eliminate the use of 28 U.S.C. § 1332(a) as a basis for removing a class action to federal court. In the context of discussing supplemental jurisdiction under 28 U.S.C. § 1367, this Court recognized that even after the passage of CAFA, there could be class actions that do not fall within CAFA's ambit that could be removed to federal court. 545 U.S. at 571-572.

B. The District Court Based its Finding of Original Jurisdiction on 28 U.S.C. § 1332(a) and not on a State Law.

Contrary to Petitioners' argument, the district court did not find that Louisiana Code of Civil Procedure

article 595(A) created federal subject matter jurisdiction over this matter. Rather, in the course of determining the amount in controversy as to the named class representatives' claims, the district court appropriately looked to Louisiana substantive law and considered the attorneys fees that were recoverable by the named class representatives under Louisiana Code of Civil Procedure article 595(A). The district court's ruling is consistent with principles established by this Court.

(1) Federal Courts Must Apply the Forum State's Rules Regarding the Applicable Measure of Damages, Including Special and Punitive Damages.

Under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), Louisiana law will provide the rule of decision in this case, so it was entirely appropriate for the district court to look to Louisiana law in determining the amount in controversy for the named class representatives' claims. Further, this Court has instructed that while the determination of the value of the matter in controversy for purposes of establishing federal jurisdiction is a federal question to be decided under federal standards, "the federal courts must, of course, look to state law to determine the nature and the extent of the right to be enforced in a diversity case." *Horton v. Liberty Mut. Ins. Co.,* 367 U.S. 348, 352-353, 81 S.Ct. 1570, 1573, 6 L.Ed.2d 890 (1961). "This includes applying the forum state's rules regarding the applicable measure

of damages and the availability of special and punitive damages." 14 B. Wright & A. Miller, Federal Practice & Procedure § 3702 citing, *Vance v. W.A. Vandercook Co.*, 170 U.S. 468, 472, 18 S.Ct. 645, 647, 42 L.Ed. 1111 (U.S. 1898).

The district court clearly did not err in considering the attorneys fees that were recoverable by the named class representatives under Louisiana Code of Civil Procedure article 595(A) in the course of determining whether the amount in controversy requirement of 28 U.S.C. § 1332(a) had been satisfied.

(2) The District Court's Ruling is Consistent with this Court's *Allapattah* Opinion.

The district court's approach is also consistent with this Court's ruling in *Allapattah, supra,* as well as the United States Court of Appeals for the Fifth Circuit's ruling in *Grant v. Chevron Phillips Chemical Co. L.P.*, 309 F.3d 864 (5th Cir. 2002), *cert. denied,* 538 U.S. 945, 123 S.Ct. 1634, 155 L.Ed.2d 486 (2003).[5] In

[5] *Grant* involved a class action lawsuit filed under Louisiana law seeking tort damages resulting from an industrial accident at a chemical plant. The case was removed on the basis of diversity of citizenship jurisdiction, and remand was denied after the court found that the Louisiana class action attorney's fee statute allowed attorney's fees to be awarded and mandated that, if awarded, they must be attributed to the named class representative's claim.

Allapattah, *supra*, this Court held that the supplemental jurisdiction statute, 28 U.S.C. § 1367, allows a district court to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the district court has jurisdiction over the claims of at least one of the class representatives. In *Grant,* the Fifth Circuit, applying this same principle, held that "when there is state statutory authority for the court to award attorney's fees to class representatives, 'either with mandatory or discretionary language, such fees may be included in the amount in controversy.'"[6] *Grant,* 309 F.3d at 874, *quoting Galt G/S v. JSS Scandinavia,* 142 F.3d 1150, 1156 (9th Cir. 1998). The *Grant* court concluded that Louisiana Code of Civil Procedure article 595(A) provides the statutory authority for a court to award attorney's fees to the named class representative. *Id.* at 876. Therefore, in determining the amount in controversy for the named class representatives' claims, it is proper to consider the attorneys fees that the named class representatives would have a right to recover as a result of article 595(A).

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[6] *Grant* was decided before this Court's ruling in *Allapattah*, but the Fifth Circuit in *Grant,* relied upon principles that were first expressed by the Fifth Circuit in *In re: Abbott Laboratories,* 51 F.3d 524 (5th Cir. 1995). This Court's rationale in *Allapattah*, *supra*, is consistent with the rationale of *Abbott.*

(3) The District Court's Ruling is Also Consistent with *Syngenta*.

Petitioners' lengthy discussion of *Syngenta Crop Protection, Inc. v. Henson,* 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002) misses the mark. The case here has nothing to do with the All Writs Act, 28 U.S.C. § 1651, and, unlike the district court in *Syngenta*, the district court in this case did not look beyond the diversity jurisdiction statute, 28 U.S.C. § 1332, to find subject matter jurisdiction. As Petitioners note in their brief at p. 12, *Syngenta*, recognized that, based upon the plain terms of 28 U.S.C. § 1441(a), in order properly to remove an action pursuant to § 1441(a), "petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts." 537 U.S. 28, 33, 123 S.Ct. 366, 370. In *Syngenta*, the removing parties failed to rely on a specific statutory grant of original jurisdiction. Presumably because the removing parties in *Syngenta* could not establish that the claims fell within the grant of original jurisdiction found in 28 U.S.C. § 1332 for diversity cases, they attempted to use the All Writs Act, found in 28 U.S.C. § 1651, as a basis for establishing original jurisdiction for purposes of removal under 28 U.S.C. § 1441(a). The problem with that was that there is no specific language in the All Writs Act that creates original jurisdiction over a matter. In contrast, Respondents in this matter relied upon a clear and specific grant of original jurisdiction over the claims at issue in 28 U.S.C. § 1332(a) as the basis for establishing that removal of this matter

under 28 U.S.C. § 1441(a) was proper. Accordingly, Petitioners' reliance on *Syngenta* is misplaced.

(4) The District Court Properly Looked to Louisiana Law in Determining the Amount in Controversy.

Utilizing the procedure established by this Court in *Erie*, *supra*, *Horton*, *supra*, and *Allapattah*, *supra*, and by the Fifth Circuit in *Grant*, the district court in this matter properly looked to Louisiana law to evaluate whether one of the requirements of § 1332(a), the amount in controversy, was satisfied as to the named class representatives' claims. The district court's ruling here is, for all salient purposes, the same as the Fifth Circuit's ruling in *Grant*, *supra*. This Court denied the application for a writ of certiorari in *Grant*, *supra*, and there is no reason here to do differently.

Petitioners are incorrect in taking the position that Louisiana Code of Civil Procedure article 595(A) is procedural and that the Fifth Circuit's decision in *Grant*, *supra*, is in conflict with *Syngenta*, *supra*. The Fifth Circuit's holding in *Grant*, *supra*, does not vest the Louisiana Legislature with the authority under the United States Constitution to enact procedural statutes that vest federal courts with original subject matter jurisdiction. As stated above, *Grant*, *supra*, simply recognized that, in determining the amount in controversy for the named class representatives' claims, it was proper for the district court to consider

the attorneys fees that the named class representatives would have a right to recover under Louisiana law. That right is statutorily found in Louisiana Code of Civil Procedure article 595(A). The Fifth Circuit correctly rejected any argument that this right to attorneys fees was procedural in nature because it happens to be found in the Louisiana Code of Civil Procedure. The Fifth Circuit looked to the nature of the right and held: "[D]espite its location in the **LCCP, art. 595(A) is obviously substantive on its face**, specifying entitlement to costs and fees, not when or how to plead them, whether a motion is required, or the like." *Id.* at 875, n.37 (emphasis added); see also, *Abbott, supra*. Accordingly, as a substantive right under Louisiana law, the district court, sitting in diversity, was bound to apply that law. *Erie, supra.*

Grant is not in conflict with *Syngenta*. *Grant* did not expand the scope of original jurisdiction by authorizing state legislatures to create federal subject matter jurisdiction. *Grant* simply applied longstanding federal jurisprudence in finding that Louisiana Code of Civil Procedure article 595(A) is indeed a substantive statute and applied that statute to determine the amount in controversy for purposes of establishing original jurisdiction under 28 U.S.C. § 1332(a). Contrary to Petitioner's position, the district court in *Grant,* as well as the district court in this matter, did not rely on a state statute to create original jurisdiction in the federal courts. Rather, the district courts relied on the grant of original jurisdiction provided for in 28

U.S.C. § 1332(a). The court's reference to Louisiana code of Civil Procedure article 595(A) was simply for the purpose of determining the amount in controversy. Accordingly, the Fifth Circuit's decision in *Grant* and the district court's decision in this matter, are not in conflict with *Syngenta* and are in accord with the jurisprudence of this Court.

C. In the Alternative, if this Court Concludes that Removal of a Class Action is not Proper Under 28 U.S.C. § 1332(a), this Court Should Remand to the District Court for a Determination of Whether Removal was Proper Under 28 U.S.C. § 1332(d)(2).

Finally, in the alternative, if this Court should find that the only basis upon which a state class action, such as the one at issue, may be removed after CAFA is on the basis provided for in 28 U.S.C. § 1332(d)(2) (which is denied), this matter should be remanded to the district court for a determination of whether removal was proper under 28 U.S.C. § 1332(d)(2). See Supreme Court Rule 10. This matter was removed to federal court based upon both 28 U.S.C. § 1332(a) and 28 U.S.C. § 1332(d)(2).[7] In footnote 1 of the district court's Order and Reasons, the court states: "The court does not address Mosaic's alternative basis of jurisdiction under the Class

[7] See Respondent's Notice of Removal attached as Exhibit B to Petitioners' Appendix.

Action Fairness Act (CAFA), 28 U.S.C. § 1332(d).[8] Accordingly, while there is ample support in the Petitioner's complaint, in the record, and in the relevant jurisprudence to support a finding that the aggregate of the class members' claims exceeds $5,000,000.00, the district court did not make a determination with regard to that basis for removal. Therefore, in the event that this Court should conclude that, under CAFA, the exclusive means for removing state class actions is under 28 U.S.C. § 1332(d)(2) (which is denied), this Court should remand the matter to the district court for a determination of whether the removal was proper under that provision.

CONCLUSION

The Petitioners have not established a compelling reason for this Court to grant a writ of certiorari in this matter. The underlying decisions of the district court and the Fifth Circuit do not raise an important

[8] See Order and Reasons of district court (page 2, note 1) attached as Exhibit A to the Respondent's Appendix. It should be noted that the Appendix attached to Petitioners' brief does not include the actual Order and Reasons of the district court. The Order and Reasons attached to Petitioners' Appendix contains language that is not found in the actual Order and Reasons entered by the district court and omits the three footnotes found in the actual Order and Reasons. Accordingly, this Court should not rely upon the Order and Reasons attached to Petitioners' brief.

question of federal law that needs to be settled by this Court. The district court properly utilized the traditional rules of statutory construction adopted by this Court and interpreted the jurisdictional provisions found in 28 U.S.C. § 1332(a) and § 1332(d)(2). Those provisions are not ambiguous, are not in conflict with each other, and can be read harmoniously to allow for removal of class actions under either the complete diversity provision found in 28 U.S.C. § 1332(a) or under the CAFA diversity jurisdiction provision found in 28 U.S.C. § 1332(d)(2). Accordingly, a writ of certiorari is not warranted.

Petitioners also have not established that the position taken by the district court is in conflict with any decision of this Court. The district court properly relied on the specific grant of original jurisdiction provided for in 28 U.S.C. § 1332(a) as the basis for asserting jurisdiction over the removed matter. In the course of determining whether the named class representative's claim exceeded the jurisdictional amount required by 28 U.S.C. § 1332(a), the district court employed the procedure authorized by this Court. It looked to state substantive law, including Louisiana Code of Civil Procedure article 595(A). Such action is clearly in accord with this Court's prior decisions. Accordingly, there is no compelling reason to grant the writ of certiorari in this matter.

Finally, in the alternative, if this Court should find that the only basis upon which a state class action, such as the one at issue, may be removed after CAFA is on the basis provided for in 28 U.S.C.

§ 1332(d)(2) (which is denied), this matter should be remanded to the district court for a determination of whether the matter was properly removed under 28 U.S.C. § 1332(d)(2). While there is ample support in the Petitioner's complaint, in the record, and in the relevant jurisprudence to support a finding that the aggregate of the class members' claims exceeds $5,000,000.00, the district court did not make a determination with regard to that basis for removal. Accordingly, in the alternative, this Court should remand the matter to the district court for a determination of whether the removal was proper under that provision.

The Petition for Writ of Certiorari should be denied.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FLORENCE HARVEY ET AL.	CIVIL ACTION
VERSUS	NO: 06-9510
MOSAIC FERTILIZER, L.L.C.	SECTION: "S" (5)

ORDER AND REASONS

IT IS HEREBY ORDERED that the motion to remand of Florence Harvey, Ulysses Gauthreaux, and Lionel and Ernestine Albert is DENIED. (Document #7.)

I. BACKGROUND

Florence Harvey, Ulysses Gauthreaux, and Lionel and Ernestine Albert filed a "Class Action Petition for Damages" in the 23rd Judicial District Court for the Parish of St. James, State of Louisiana, against Mosaic Fertilizer, L.L.C. a/k/a Mosaic Faustina Fertilizer Plant (Mosaic or Faustina), on behalf of themselves and others similarly situated in sustaining damage as a result of an explosion and release of hazardous substances from the Mosaic facility in St. James Parish. On October 11, 2006, workers at the Faustina facility were processing product when hydrogen gas leaked and ignited. The plaintiffs allege a claim of negligence for the acts of others, pursuant to La. Civil Code art. 2317.

Mosaic, a Delaware corporation with its principal place of business in Florida, removed the case to

federal court, asserting diversity jurisdiction.[1] The plaintiffs filed a motion to remand the case to state court.

II. DISCUSSION

Mosaic contends that the amount in controversy for at least one plaintiff exceeds $75,000.[2]

Motions to remand to state court are governed by 28 U.S.C. § 1447(c), which provides in relevant part: "If at any time before the final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." "District courts have original jurisdiction over civil actions where the amount in controversy exceeds $75,000, and there is diversity between all parties." *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999). Under Louisiana law, a plaintiff is prohibited, except in circumstances not relevant here, from alleging a specific dollar amount of damages. *Grant v. Chevron Phillips Chemical Co., L.P.*, 309 F.3d 864, 868 (5th Cir. 2002). However, the plaintiff may recover an award in damages more than he demands. *Id.* at 869. In such situations, the removing defendant must prove by a preponderance of the evidence that the

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[1] The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d).

[2] The plaintiffs do not argue that diversity of citizenship is lacking.

amount in controversy exceeds $75,000. *Id.* at 868. "The removing party may satisfy this burden in either of two ways: "(1) by demonstrating that it is 'facially apparent' from the petition that the claim likely exceeds $75,000 or (2) by setting forth the facts in controversy – preferably in the removal petition, but sometimes by affidavit – that support a finding of the requisite amount." *Id.*

In Louisiana cases, "the federal district court's jurisdictional-amount calculus must include attorney's fees when an applicable Louisiana statute allows the award of such fees. *Id.* All awardable attorney's fees in a class action[3] are attributed to the class representatives to the exclusion of other members of the class. *Id.* at 870-71. "[C]alculation of the anticipated recovery of the class representatives – the only one that matters for purposes of § 1332 – must include those potential attorney's fees in addition to damages." *Id.* at 873.

It is facially apparent from the petition that the claim of at least one named plaintiff is likely to exceed $75,000. Harvey alleges that she was at home in her trailer when the explosion occurred. The explosion rocked her trailer and caused her such fear and

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[3] La. Code Civ. Proc. art 595(a) provides:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

surprise that she required emergency medical treatment for "uncontrolled" blood pressure and pulse. One of the concrete piers supporting her trailer is askew. Gauthreaux became afraid when he heard the explosion, which caused a large window in his home to break and other damage. The Alberts were at home when the explosion occurred. They allege damage to their home, including a cracked driveway and cracked living room floor, and personal fear and fright. When awardable attorney's fees are attributed to Harvey, Gauthreaux, and the Alberts in calculating the amount in controversy, any one of their claims likely exceeds the jurisdictional threshold. Moreover, the plaintiffs have not filed stipulations or affidavits of the parties or counsel that their claims fall below the jurisdictional amount.

Accordingly, there is diversity jurisdiction, and the motion to remand is denied.

New Orleans, Louisiana,
this 19th day of March, 2007.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE